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No. 89-7024

In The

Supreme Court of the United States

October Term, 1989

WARREN McCLESKEY,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Must the state demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?

2.

Did Petitioner abuse the writ by failing to pursue in his first federal habeas corpus petition a claim raised in his first state habeas corpus proceeding, particularly when counsel acknowledged he made a specific decision not to raise the issue in the first federal habeas corpus proceeding?

3.

Did the Eleventh Circuit Court of Appeals properly conduct a harmless error analysis and correctly find that any alleged constitutional violation was harmless beyond a reasonable doubt?

4.

Did the district court err both in finding a *Massiah* violation based on clearly erroneous factual findings and in failing to grant Respondent's motion for relief from judgment based on the subsequent availability of the testimony of Offie Evans?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE..... 1

STATEMENT OF THE FACTS..... 5

(a) The Commission of the Crime 5

(b) The Availability of the Statement of Offie Evans 6

(c) The Evidence Concerning the Massiah Claim... 8

SUMMARY OF THE ARGUMENT 15

ARGUMENT 19

I. THE PETITIONER BEARS THE BURDEN OF PROVING HE HAS NOT ABUSED THE WRIT BY THE INCLUSION OF A CLAIM IN A SUBSEQUENT FEDERAL HABEAS PETITION THAT WAS OMITTED FROM THE FIRST FEDERAL HABEAS PETITION..... 1

II. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY FOUND THAT PETITIONER HAD ABUSED THE WRIT BY FAILING TO RAISE A *MASSIAH* CLAIM IN HIS FIRST FEDERAL HABEAS CORPUS PETITION 25

III. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY FOUND ANY ALLEGED *MASSIAH* VIOLATION TO BE HARMLESS 37

TABLE OF CONTENTS – Continued

Page

IV. THE DISTRICT COURT ERRED IN FINDING A VIOLATION OF *MASSIAH V. UNITED STATES* AND THE FINDING BY THE DISTRICT COURT TO THIS EFFECT IS CLEARLY ERRONEOUS IN LIGHT OF THE OVERWHELMING EVIDENCE TO THE CONTRARY..... 42

V. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING RESPONDENT'S MOTION FOR RELIEF FROM JUDGMENT... 44

CONCLUSION 47

TABLE OF AUTHORITIES

Page(s)

CASES CITED

Amadeo v. Zant, 486 U.S. 214 (1988) 37, 42

Anderson v. Bessemer City, 470 U.S. 564 (1985) 42, 43

Antone v. Dugger, 465 U.S. 200 (1984) 26

Booker v. Wainwright, 764 F.2d 1371 (11th Cir. 1985) 23

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 27

Chapman v. California, 386 U.S. 18 (1967) 39

Cuyler v. Sullivan, 446 U.S. 335 (1980) 27

Depree v. Newsome, No. 1:85-CV-3733-RLV (N.D. Ga. July 10, 1990) 43

Engle v. Isaac, 456 U.S. 107 (1982) 20

Fay v. Noia, 372 U.S. 391 (1963) 22, 24

Fiske v. Kansas, 274 U.S. 380 (1927) 27

Giglio v. United States, 405 U.S. 150 (1972) 3

Gullett v. Armontrout, 894 F.2d 308 (8th Cir. 1990) 24

Johnson v. Zerbst, 304 U.S. 458 (1938) 22, 25

Klapprott v. United States, 335 U.S. 601 (1949) 46

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 46

Massiah v. United States, 377 U.S. 201 (1964) ..... *passim*

McCleskey v. Kemp, 481 U.S. 279 (1987) 4

TABLE OF AUTHORITIES – Continued

Page(s)

McCleskey v. Kemp, 482 U.S. 920 (1987) 3

McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (*en banc*) 2

McCleskey v. State, 245 Ga. 108, 263 S.E.2d 146, *cert. denied*, 449 U.S. 891 (1980) 2

McCleskey v. Zant, ___ U.S. ___, 110 S.Ct. 2585 (1990) 4, 19

McCleskey v. Zant, 580 F. Supp. 338 (N.D.Ga. 1984) 2

McCleskey v. Zant, 890 F.2d 342 (11th Cir. 1989) 4, 40

Miller v. Fenton, 474 U.S. 104 (1985) 27

Napue v. Illinois, 360 U.S. 264 (1959) 38

Neil v. Biggers, 409 U.S. 188 (1972) 37

Price v. Johnston, 334 U.S. 266 (1948) 22

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 27

Salinger v. Loisel, 265 U.S. 224 (1924) 19

Sanders v. United States, 373 U.S. 1 (1963) ..... *passim*

Satterwhite v. Texas, 486 U.S. 249 (1988) 41

Strickland v. Washington, 466 U.S. 668 (1984) 27

Sullivan v. Wainwright, 464 U.S. 109 20

United States v. Morrison, 449 U.S. 361 (1981) 39

United States v. United States Gypsum Co., 333 U.S. 364 (1948) 42

Wong Doo v. United States, 265 U.S. 239 (1924) 20

Woodard v. Hutchins, 464 U.S. 377 (1984) 26

TABLE OF AUTHORITIES – Continued

Page(s)

STATUTES AND RULES CITED

O.C.G.A. § 50-18-70 8

28 U.S.C. § 2244(b) 21, 26

28 U.S.C. § 2254(d) 27

Fed. R. Civ. P. 52(a) 27, 39, 42

Fed. R. Civ. P. 60(b) 4, 44, 45, 46

Rule 9(b), Rules Governing Section 2254 Cases 21, 22, 23, 26

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BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

In addition to the statement of the case set forth by the Petitioner, Respondent would add the following: Petitioner, Warren McCleskey, David Burney, Bernard Depree, and Ben Wright, Jr., were indicted on June 13, 1978, for murder and two counts of armed robbery. The Petitioner was tried separately beginning on October 9, 1978, and was found guilty on all three counts, and was sentenced to the death penalty and two consecutive life sentences. Petitioner's convictions and sentences were

affirmed on direct appeal. *McCleskey v. State*, 245 Ga. 108, 263 S.E.2d 146, *cert. denied*, 449 U.S. 891 (1980).

In the first state habeas petition filed by Robert Stroup on January 5, 1981, the Petitioner included a challenge to the alleged failure to disclose an "arrangement" with "a police agent or informer" (Offie Evans) and the alleged deliberate withholding by the prosecution of the statement made by the Petitioner to Evans. (J.A. 20-21). Petitioner subsequently filed an amendment to that state petition in which Petitioner challenged the introduction into evidence at trial of his statements to "an informer" and specifically asserted that the statements were taken in violation of the Sixth Amendment. (J.A. 22).

On December 30, 1981, the Petitioner filed a petition for habeas corpus relief in the United States District Court for the Northern District of Georgia. Among other allegations the Petitioner challenged the failure to disclose an "understanding" with witness Evans; however, Petitioner did not assert a Sixth Amendment violation in relation to the use at trial of the testimony of Offie Evans.

After extensive evidentiary hearings were held before the district court, on February 1, 1984, the court granted habeas corpus relief based on the allegation of an undisclosed deal with Offie Evans. *McCleskey v. Zant*, 580 F. Supp. 338 (N.D.Ga. 1984).

On January 29, 1985, the Eleventh Circuit Court of Appeals sitting *en banc* issued an opinion which affirmed all convictions and sentences, particularly reversing the district court on the *Giglio* claim as to the testimony of Offie Evans. *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985) (*en banc*).

The Petitioner then filed a petition for a writ of certiorari in this Court. In that petition, the Petitioner asserted that the death penalty was discriminatorily applied, and that there was a violation of *Giglio v. United States*, 405 U.S. 150 (1972), based upon the testimony of Offie Evans. This Court subsequently granted the petition for a writ of certiorari limited to the consideration of the application of the death penalty. On April 22, 1987, the Court affirmed the denial of habeas corpus relief. *McCleskey v. Kemp*, 481 U.S. 279 (1987). On or about May 16, 1987, Petitioner filed a petition for rehearing in this Court. In that petition, Petitioner reasserted his claim relating to a violation of *Giglio v. United States*. On June 8, 1987, this Court denied the petition for rehearing. *McCleskey v. Kemp*, 482 U.S. 920 (1987).

On June 8, 1987, a successive state habeas corpus petition was filed raising several claims including the state's alleged failure to disclose impeaching evidence (the alleged "deal" with Offie Evans) at trial. On June 22, 1987, Petitioner filed an amendment to the petition raising two allegations, that is, that Offie Evans was acting as an agent for the state at the time the Petitioner made statements to Evans and that the prosecutor failed to correct alleged misleading testimony by Evans. Relief was denied on July 1, 1987.

On July 7, 1987, Petitioner filed a second federal habeas corpus petition in the United States District Court for the Northern District of Georgia. After hearings were held by the district court on July 8, 1987, July 9, 1987, and August 10, 1987, the district court entered an order on December 23, 1987, granting habeas corpus relief only as to Petitioner's murder conviction and sentence based

upon the finding of a violation of *Massiah v. United States*, 377 U.S. 201 (1964). (J.A. 63).

On May 6, 1988, Respondent filed a motion for relief from judgment under Fed. R. Civ. P. 60(b) in the district court. Pursuant to the June 17, 1988, order of the district court, both parties conducted discovery including taking the deposition of Offie Evans on July 13, 1988. On January 10, 1989, the district court denied the motion for relief from judgment. (J.A. 102).

A panel of the Eleventh Circuit Court of Appeals entered an opinion on November 22, 1989, amended on December 13, 1989, specifically reversing the finding of the district court and concluding that the district court abused its discretion by failing to find an abuse of the writ and that the Petitioner had abused the writ by deliberately abandoning the Sixth Amendment *Massiah* claim at the time of the first federal petition and that any error based on an alleged *Massiah* violation was harmless. *McCleskey v. Zant*, 890 F.2d 342 (11th Cir. 1989). (J.A. 112). The circuit court did not rule on Respondent's assertions that the district court's finding of a *Massiah* violation was based on clearly erroneous factual findings and that the district court erred in denying Respondent's motion for relief from judgment. Rehearing and rehearing *en banc* were denied on February 6, 1990.

Petitioner then filed a petition for a writ of certiorari in this Court which was granted on June 4, 1990, with a question being added by the Court. *McCleskey v. Zant*, ___ U.S. ___, 110 S.Ct. 2585 (1990). (J.A. 136).

STATEMENT OF FACTS

(a) The Commission of the Crime

The evidence presented at Petitioner's trial showed that on May 13, 1978, he and three coindictees committed an armed robbery at the Dixie Furniture Store in Atlanta, Georgia. The evidence showed that the Petitioner entered the front of the store while his three coindictees entered the back. Petitioner was positively identified at trial as one of the participants in the robbery. (T. 231-232, 242, 250).

While Depree, Burney and Wright, the coindictees, held several employees in the back of the store, the Petitioner was in front. Employee Classie Barnwell had activated a silent alarm, resulting in the arrival of Officer Frank Schlatt. Shortly after Schlatt entered the front of the store, he was shot. After hearing two shots, Wright observed the Petitioner running out of the front of the store. Wright, Depree and Burney ran out of the back. When they all arrived at the car, Petitioner stated that he had shot the police officer. (T. 658-659).

Petitioner testified in his own behalf at trial and stated that he knew Ben Wright and the other coindictees, but that he had not participated in the robbery. Petitioner relied on an alibi defense.

Petitioner was also identified at trial by two witnesses who had observed him take part in a prior similar robbery. Mr. Paul David Ross, manager of the Red Dot Grocery Store, also testified that during the course of the Red Dot robbery, his nickel-plated .38 revolver was taken.

On its rebuttal case, the state presented the testimony of Arthur Keissling, who identified the Petitioner as a participant in the robbery of Dot's Produce on March 28, 1978. (T. 887-889, 896).

The state also presented the testimony of Offie Gene Evans in rebuttal. Mr. Evans had been incarcerated in the Fulton County Jail in a cell located near the Petitioner and Bernard Depree. Evans testified that the Petitioner had talked about the robbery while incarcerated and had admitted shooting Officer Schlatt. (T. 869-870). Evans also testified that the Petitioner said he would have shot his way out even if there had been a dozen policemen.

(b) The Availability of the Statement of Offie Evans

The written statement of Offie Evans was not obtained by Petitioner until July, 1987. Even though the lower courts found counsel was "unaware" of the statement prior to that time, the record establishes counsel should have been aware of it and that the state did not "conceal" its existence.

The trial court conducted an in camera inspection of certain specified material noting in its order, "The court finds that although the documents might become material for rebuttal at trial, they are not now subject to discovery." (T.R. 46). During cross-examination of the Petitioner at trial, counsel for the Petitioner objected to cross-examination by the assistant district attorney indicating that he had asked for all statements by the Petitioner. The trial court stated, "He has a statement which was furnished to the Court but it doesn't help your client." (T. 830).

At the first state habeas corpus hearing trial counsel, John Turner, testified that the assistant district attorney, Russell Parker, told him there were two items not included in the file shown to Turner: the grand jury testimony of a witness and a statement of an unnamed individual. (S.H.T. 77).[1]

The deposition of the assistant district attorney, Russell Parker, was taken by Mr. Robert Stroup, counsel for the Petitioner, on February 16, 1981. During that deposition, Mr. Parker told Mr. Stroup that he "had a file I *made available* to all the defense counsel in this case." *Id.* (Emphasis added). Thus, the file identified at the deposition and requested by Mr. Stroup was the file *"that was made available* back at pre-trial and trial." *Id.* at 5. (Emphasis added). At no time is there any indication that this file included the matter which was the subject of the in camera inspection. This was the file given to habeas counsel subsequent to the deposition.

Additionally, during the deposition, Mr. Stroup, counsel for Petitioner, referred to a "statement" from Offie Evans. In response to a question concerning the statement, Mr. Parker clarified stating, "When you refer to a statement, Offie Evans gave his statement but it was not introduced at the trial. It was part of that matter which was made in camera inspection (sic) by the Judge prior to trial." *Id.* at 8.

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[1] The transcript of the first state habeas corpus proceeding was included as an exhibit in the first federal habeas corpus action. The district court took judicial notice of those records.

Petitioner obtained a copy of the statement, apparently from the Atlanta Police Department's file, pursuant to a request made under the Georgia Open Records Act, O.C.G.A. § 50-18-70 *et seq.*, for the first time in 1987.

(c) The Evidence Concerning the *Massiah* Claim.

Petitioner's statement of facts relies exclusively on the factual findings made by the district court which Respondent has continually asserted are clearly erroneous. In order to have a more complete view of the Respondent's position on the so-called *Massiah* violation, Respondent would note the following additional information contained in the record.

The evidence is fairly consistent that Offie Evans was arrested on or about July 3, 1978. Evans met with Russell Parker and two detectives from the Atlanta Police Department at the Fulton County Jail on July 12, 1978. The main facts in dispute are whether Evans was initially placed in the cell next to Petitioner or whether he was subsequently moved there and whether Evans was instructed to overhear conversations.

All state's witnesses testifying before the district court consistently denied that there was any request to move Offie Evans, that Offie Evans was ever instructed to obtain any statements from the Petitioner or to overhear any conversations of the Petitioner. Due to the belated presentation of evidence on this claim, the state was unable to present any documentary evidence on the actual location of Mr. Evans in the jail on any particular date as the records from 1978 were destroyed in the regular course of business. The record is replete with

references, however, revealing that Mr. Evans was placed in the cell next to Petitioner on the first day that Mr. Evans entered the Fulton County Jail.

At trial Carter Hamilton, a floor deputy on the first floor of the Fulton County Jail, testified that in July of 1978, the Petitioner was in jail cell 1 North 15. (T. 860). Offie Evans also testified at the trial that Petitioner was in the cell next to him at the Fulton County Jail. Evans testified that when he came into the jail he was placed in solitary confinement "straight from the street." (T. 873). When Evans was asked when he was moved, he responded that he was moved on August 14, 1978. (T. 881).

At the original state habeas corpus hearing Evans testified that he was placed in solitary confinement upon being taken to the Fulton County Jail and remained there "a little bit better than a month." Evans testified that while he was in solitary confinement he was adjacent to the cell of the Petitioner. (S.H.T. 116-117).

Russell Parker, the assistant district attorney who tried the case, testified at the original state habeas corpus proceedings that the first time he found out about Evans' testimony was from either Detectives Jowers or Harris who had apparently been contacted by Deputy Hamilton. Mr. Parker recalled specifically that he did talk to Evans at some time and talked to Evans at the Atlanta Police Department as well. Mr. Parker did not know Evans prior to that time and did not know of any instances when Evans had worked for the police department as an informant prior to the conversations being overheard. (Parker deposition at 15).

In addition to the above, the written statement of Offie Evans itself states, "I'm in the Fulton County Jail cell #1 North 14 where I have been since July 3, 1978 for escape." Thus, Mr. Evans himself in that statement indicates that he was in the cell next to the Petitioner on the first day Evans came to the Fulton County Jail.

The testimony of Mr. Parker before the district court establishes, as did his earlier testimony, that he had never known Evans prior to July 12, 1978, when he received information that an inmate at the jail had information about the case. (R4-130-1). Mr. Parker did not ask anyone to move Evans or ask Evans to overhear any conversations and never suggested that Evans do such. (R6-11). Mr. Parker testified that he did not ask Carter Hamilton or Ulysses Worthy to move Evans and it never came to his attention that any such request had been made.

Detective Welcome Harris testified that his first contact with Offie Evans was on July 12, 1987. He recalled going to the jail on that day with Russell Parker and with another detective that he thought was Detective Dorsey. Detective Harris based this recollection primarily on the notes of Mr. Parker. Detective Harris volunteered that he thought the interview occurred in Captain Worthy's office, but he was sure Worthy was not present. (R4-196).

Detective Harris did not know that Evans had been an informant prior to that time. His next encounter with Evans was on August 1, 1978. Detective Harris did not hear anyone tell Evans to keep his eyes and ears open and he did not tell Evans to do so. (R5-24). He was emphatic that he never asked anyone to move Evans, never asked Evans to overhear any conversations and

never suggested that Evans overhear conversations. He did not even recall Mr. Worthy being in the room during the interview, much less anyone making any such requests of Mr. Worthy.

Carter Hamilton testified before the district court and stated that Evans came in on an escape charge and would have been put in isolation as an escape risk. (R4-177). He did not have any conversation with Evans regarding the murder prior to July 11, 1978, and had no conversations with any detectives regarding the case prior to that date. He knew of no one that implied to Evans that Evans should listen to the Petitioner or talk with the Petitioner.

Hamilton recalled Detective Harris and Russell Parker coming to the jail along with another officer on July 12, 1978. (R4-182). Hamilton stayed in the room, but did not have a recollection specifically as to who the other detective was, although it could have been Detective Dorsey. He had no other specific conversations about the case with Evans during July of 1978.

To Hamilton's knowledge the first time anyone came to the jail to talk with Evans about the case was on July 12, 1978. Hamilton had no knowledge of Evans being moved and he recalled Evans being in isolation when Evans first came to the Fulton County Jail. Hamilton testified positively that no one asked to have Evans moved so that he could overhear conversations of the Petitioner, that Hamilton personally never asked Worthy to move Evans and that he did not tell Worthy that anyone wanted Evans moved. Further, during the interview on July 12, 1978, no one asked Evans to overhear conversations. (R6-76).

Officer Sydney Dorsey acknowledged that he knew Evans prior to this case and that Evans on occasion had been cooperative, but he had never gotten any information from Evans where Evans ended up testifying. (R5-54). He did not recall going to see Evans at the Fulton County Jail at the time of this case or at any other time and did not recall attending a meeting with Parker and Harris and Evans. He acknowledged that it was possible he had met with Evans on occasions during the investigation, but testified that had he made any promises to Evans, he would have had a specific recollection of that fact. *Id.* at 65. Detective Dorsey testified positively that he did not do anything directly or indirectly to encourage Evans to obtain evidence from the Petitioner and had no knowledge of anything of that sort occurring. He did not direct Evans to engage in conversations and never heard anyone else make such a request. He was positive that he made no request that Evans be moved and he did not ask Carter Hamilton to make such a request. (R6-81).

The testimony of Ulysses Worthy before the district court is so inconsistent, confusing and incoherent that one cannot discern readily any specific facts. Mr. Worthy initially testified that he recalled the murder of Officer Schlatt being brought up between Dorsey and Evans, but that he was not a participant in the conversation and he did not recall Dorsey asking Evans to listen for statements by the Petitioner. (R5-148). Subsequently, Mr. Worthy also testified that he did not recall Mr. Dorsey asking Evans to listen to the conversations of the prisoners. (R5-148). When asked whether he recalled if Evans was asked to engage in conversations, Worthy responded, "Seems I recall something being said to that effect to Mr.

Evans . . . but I'm not sure if it came from Mr. – from Detective Dorsey or who." *Id.* at 149. He testified that he was not sure and was not sure that Evans agreed to the arrangement.

Worthy recalled Russell Parker and Detective Harris coming out to interview Evans, but was not certain whether Detective Dorsey was present on that occasion. Mr. Worthy was finally asked if he recalled a request being made that "someone" be placed in a cell next to "someone else" so that he could overhear conversations and Worthy responded that he did. (R5-153). Mr. Worthy did not recall who made the request and thought Evans was placed in a cell next to the Petitioner. He did not recall when it was that he might have been asked to move Evans and he did not know of any conversations that Evans had overheard. *Id.* at 156.

At the second hearing before the district court, Mr. Worthy testified that the first time he recalled Evans ever being brought to his attention was when one of the deputies informed him that Evans had information to pass on to the authorities. Mr. Worthy was positive that Deputy Hamilton brought Evans to his attention. (R6-14). Worthy was certain that this was his first meeting with Offie Evans. Mr. Worthy recalled that investigators came to talk to Evans within a few days and to his knowledge this was the first time anyone had come to the jail to talk to Evans regarding the Schlatt murder. *Id.* at 17. Worthy specifically testified that after the meeting none of the investigators asked him to do anything.

Worthy subsequently testified that it was Hamilton that allegedly asked him to move Evans, but he was

uncertain as to who asked Hamilton to request that the move be made. Mr. Worthy emphasized that the first time he was ever asked to move Evans was on the day the officers came out to the jail with Mr. Parker to talk with Evans and that this was the only time he was ever asked to make such a move. Mr. Worthy contradicted all other witnesses and testified that Carter Hamilton asked that Evans be placed in a cell near the Petitioner. Mr. Worthy stated that he did not know for a fact that Evans was ever actually moved and he did not hear anyone ask Evans to listen to conversations. He was positive neither Harris, Dorsey, Jowers, nor Parker asked him to move Evans so that he could overhear conversations. *Id.* at 24. On this occasion, Mr. Worthy testified that the meeting with Dorsey was at the same time the other officers were there. Mr. Worthy later testified that he did not recall if Dorsey was present with Mr. Parker. Mr. Worthy was clear that he was not present at the meetings, that he simply understood the officers came back several times.

Mr. Worthy reiterated that the only encounter he had in which he was asked that Evans be moved was after the interview occurred when Dorsey and several other officers were there. He stated that Hamilton was the first one to ask that Evans be moved and reiterated that there was no meeting prior to the occasion when Parker and the officers came to the jail when anyone had been there to talk to Evans about the Schlatt murder. After the district court specifically reminded Mr. Worthy of the importance of the case, Mr. Worthy testified that there may have been other meetings when he was not present and did not recall being told of any other meetings. He again stated that when he was asked to place the Petitioner in a cell

was on the day when Mr. Parker was at the jail. He testified he was first approached by Carter Hamilton and did not know who asked Carter Hamilton to make the request. Mr. Worthy testified on this occasion that "the officer" did not directly ask him to make any move. (R6-65-6).

It should be noted that the district court for the first time in its final order determined that Evans had information not known to the general public. Respondent knows of no proof in the record that the facts set forth in Evans' statement were unknown to the general public nor were there facts in the statement that could not have been discovered by Evans through conversations with other inmates at the jail.

Further facts regarding this issue will be set forth as necessary during the subsequent portions of the brief.

SUMMARY OF THE ARGUMENT

In the context of an allegation of abuse of the writ, the state only bears the burden of pleading abuse. Once it has been pled, a petitioner always has the burden of proving that he has not abused the writ. Neither the applicable statutes nor the case law of this Court specifically limits the concept of abuse of the writ, but rather, it is left to the district and circuit courts to examine the cases as they arise to determine whether the facts of an individual case are sufficient to excuse the conduct in question. The standard of intentional abandonment, formally embodying the concept of a knowing and intelligent waiver with a knowledge of all pertinent facts,

does not apply to an abuse of the writ case. The requirement that a petitioner actually make that type of waiver has been replaced in most other contexts with a more objective standard and there is no reason not to make that same change in the abuse of the writ context. This will facilitate the purpose of the abuse of the writ doctrine so as to eliminate needless piecemeal litigation and would also assist in eliminating the delay inherent in capital cases.

The Eleventh Circuit Court of Appeals properly ruled that Petitioner had failed to prove he had not abused the writ. In determining that there was an abuse of the writ that Court did not create a new standard and did not ignore the jurisprudence of this Court. Rather, the Court examined the examples set forth in *Sanders v. United States*, 373 U.S. 1 (1963), and correctly concluded under the facts of this case that the district court erred in finding Petitioner had not intentionally abandoned his *Massiah* claim. When Petitioner acknowledged that he was aware of the claim and counsel even raised it in the first state habeas corpus proceeding but chose not to raise it in the first federal habeas corpus proceeding, this is a clear abandonment in the context of abuse of the writ and to rule otherwise would result in needless piecemeal litigation.

The Eleventh Circuit Court of Appeals in ruling on the abuse of the writ question also did not ignore factual findings made by the district court. Most of the findings cited to by the Petitioner are actually either questions of law or mixed questions of fact and law to which the clearly erroneous rule does not apply. The circuit court properly gave deference to all true factual findings but

disagreed with the ultimate legal conclusions reached by the district court. As noted previously, the circuit court correctly concluded that the issue in question was intentionally abandoned. Furthermore, the circuit court also examined counsel's actions in investigating the *Massiah* claim and found that the investigation simply was not adequate to excuse the abusive conduct. When counsel failed to interview the key personnel involved with Offie Evans both at the jail and during the investigation of the murder case and failed to attempt to obtain the jail records, even though he obtained records from the Atlanta Police Department and the prosecutor's office for purposes of proving his discrimination claim in the first proceeding, this is clearly insufficient to excuse the failure to raise the claim.

Even if this Court were not to find an abuse of the writ or not to find that the issue was intentionally abandoned, any alleged *Massiah* violation was clearly harmless beyond a reasonable doubt. The findings of the district court are not the type of findings to which the clearly erroneous rule applies as the district court was doing nothing more than examining the state trial transcript and making ultimate legal conclusions as to whether the issue was harmless. The question of malice was thoroughly proven by all of the other evidence presented at trial. The one statement of Mr. Evans regarding makeup did not contribute to the verdict and the identification of the Petitioner as the triggerman was supported by other overwhelming evidence presented at the trial of this case. Under the circumstances of this case, if the admission of the statement was error, it was clearly harmless beyond a reasonable doubt.

Respondent has at all times challenged the factual findings of the district court as being clearly erroneous. Although the Eleventh Circuit Court of Appeals did not need to reach this issue, Respondent submits that it is clear from a review of the record that the district court's view of the facts pertaining to the *Massiah* claim is simply implausible in light of the entire record in this case. If it is concluded that the *Massiah* issue is not an abuse of the writ, it will first be necessary as a threshold matter to rule upon the clearly erroneous issue or remand to the Eleventh Circuit Court of Appeals for a ruling upon this issue. Particularly, when a district court considering the codefendant's case has reached the exact opposite factual conclusion, Respondent submits that the findings by the district court in this regard are clearly erroneous.

Finally, Respondent also has challenged the district court's denial of Respondent's motion for relief from judgment. Again, prior to a ruling on the merits on the *Massiah* claim, this issue will need to be resolved by this Court or on remand to the Eleventh Circuit Court of Appeals. Respondent submits there was sufficient evidence presented to the district court as to the critical nature of the testimony of Offie Evans in relation to the *Massiah* claim, his unavailability at the time of the hearings in the district court and the materiality of his testimony based upon the deposition subsequently obtained from Mr. Evans to justify granting the motion.

ARGUMENT

I. THE PETITIONER BEARS THE BURDEN OF PROVING HE HAS NOT ABUSED THE WRIT BY THE INCLUSION OF A CLAIM IN A SUBSEQUENT FEDERAL HABEAS PETITION THAT WAS OMITTED FROM THE FIRST FEDERAL HABEAS PETITION.

In granting the instant petition for a writ of certiorari, this Court added a specific question for the parties to address which states as follows:

> Must the state demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish an inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?

McCleskey v. Zant, ___ U.S. ___, 110 S.Ct. 2585 (1990) (J.A. 136). Respondent asserts the state does not bear any burden of proof as to the question of abuse of the writ in a habeas corpus action and "intentional abandonment" is not the exclusive standard for review of allegations of abuse.

This Court has had numerous occasions to address the question of when subsequent applications for habeas corpus relief should be reviewed on their merits by the federal district courts. As early as 1924, the Court, while holding that *res judicata* would not extend to habeas corpus proceedings held, "[I]t does not follow that a refusal to discharge on one application is without bearing or weight when a later application is being considered." *Salinger v. Loisel*, 265 U.S. 224, 230 (1924). The Court also held that when a petitioner had a full opportunity to offer proof at a hearing on the first petition, good faith

required that he produce that proof at that time and not reserve it for a subsequent petition. *Wong Doo v. United States*, 265 U.S. 239, 241 (1924).

Although this Court had earlier noted that traditional notions of finality did not have a particular place in habeas corpus, *see Sanders v. United States*, 373 U.S. 1 (1963), this Court has more recently acknowledged the significant costs associated with habeas corpus in general and second petitions in particular. In *Engle v. Isaac*, 456 U.S. 107 (1982), the Court noted that the absence of finality frustrated the state's interest in deterrence and rehabilitation and that "[l]iberal allowance of the writ, moreover, degrades the prominence of the trial itself." *Id.* at 127. The Court was also concerned that the writ of habeas corpus could frequently cost society the right to punish admitted offenders. Furthermore, habeas corpus petitions, and in particular abusive petitions, place special costs on the federal system and result in increased federal intrusion into the state system. In death penalty cases in particular, this Court has expressed concern that "there must come an end to the process of consideration and reconsideration." *Sullivan v. Wainwright*, 464 U.S. 109, 112 (1983).

Petitioner's response to this Court's inquiry, as well as to the holding of the Eleventh Circuit Court of Appeals, seems to assert that legislative history binds this Court to a narrow view as to what conduct constitutes abuse of the writ. A review of this Court's holdings and the pertinent legislative history shows, rather, that habeas corpus and the particular concept of abuse of the writ have been fluid concepts evolving through the Court's litigation of particular factual situations. Petitioner has

sought to restrict this Court and its interpretation of the term "abuse of the writ" which term forms part of 28 U.S.C. § 2244(b) and Rule 9(b) of the Rules Governing Section 2254 Cases. In those enactments, however, Congress did nothing more than insert the "abuse of the writ" terminology to allow the courts the opportunity to address the question on a case by case basis and to allow the standard to evolve as it became necessary to address the question of abuse of the writ in differing factual settings. Certainly, in 1976, the problem of abusive petitions, particularly in the context of death penalty cases, was not the same as it is today. In fact, the legislative history specifically reflects a concern with abusive petitions and the everincreasing burden on the federal court system.

Even if Rule 9(b) and 28 U.S.C. § 2244(b) are considered to be a direct codification of the standard in *Sanders* with no allowance for a change in terminology, the Petitioner misreads the essence of the holding in *Sanders* itself.

In *Sanders*, the Court focused on the principles of equity noting, "A suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *Id.* The Court specifically then delineated *examples* of abusive conduct, and the clear reading of this portion of the Court's opinion shows that this was not an exhaustive list. These examples included, but were not limited to, deliberate withholding or abandonment as well as needless piecemeal litigation *or* collateral proceedings whose only purpose is to either vex, harass *or* delay. Thus, even if the rule and statute are deemed to be a direct codification of *Sanders*, the standard which is codified is itself

necessarily flexible and subject to interpretation by the courts as necessity arises.

The first prong of the question phrased by this Court focuses on the burden of proof. Clearly, since *Price v. Johnston*, 334 U.S. 266 (1948), the state has had the burden only of pleading abuse of the writ. Any burden of proof necessarily rests with the Petitioner. The Petitioner must prove that he has not abused the writ. By disproving intentional abandonment, the Petitioner does not necessarily carry his burden of proof as he must also prove that he has not otherwise abused the writ, including that he is not guilty of any inexcusable neglect or some other type of abuse. Petitioner must show that in spite of his conduct, there is some justifiable reason for having omitted a claim.

The second aspect to this Court's question focuses on whether, in order for conduct to be abusive, there must be an "intentional abandonment" as contemplated in *Fay v. Noia*, 372 U.S 391 (1963). Respondent submits that neither Rule 9(b), 28 U.S. § 2244, nor the cases decided by this Court requires such a restrictive interpretation of the concept of abuse of the writ. Since the time of *Fay v. Noia*, the Court has continually departed from the knowing and intelligent waiver standard with respect to proceedings occurring subsequent to trial and appeal. Although the knowing and intelligent waiver standard of *Johnson v. Zerbst*, 304 U.S. 458 (1938), may be appropriate to the question of pretrial waivers of counsel, the standard no longer has application to such things as procedural defaults occurring in state court proceedings and, by analogy, should not have a place in determining whether

an individual is barred from raising a claim in a subsequent federal petition which he did not include in his first petition.

With claims omitted from an initial petition, the focus should necessarily be on whether it is a claim of which the individual either was aware, or should have been aware, based upon the circumstances at the time. In this case, there is no doubt that the Petitioner was aware of the claim as he raised it in his first state habeas corpus proceeding and counsel made a specific decision not to present the claim in the first federal habeas corpus proceeding. This is a case in which counsel asserts he believed the claim lacked merit at the time of the first state habeas corpus petition. Respondent submits that this is precisely the type of conduct that the abuse of the writ doctrine is designed to prevent. The Eleventh Circuit Court of Appeals in a prior holding examining just this question held that "The question is whether the Petitioner knew of the possibility of making such a claim, not whether he believed that the claim itself was meritorious." *Booker v. Wainwright*, 764 F.2d 1371, 1377 (11th Cir. 1985). That Court concluded that "To excuse every petitioner who later raises a claim that he earlier believed lacked merit would be to carve out an exception for the very group of successive petitions targeted by *Sanders* and Rule 9(b) – those petitions lacking serious merit, brought only for the purpose of delay or vexation." *Id.* That Court also was seriously concerned with any requirement that there be a specific determination of whether a petitioner had "believed" the claim was insubstantial. "[A] factor in ascertaining that belief would be the apparent merit of the claim itself. The very purpose of

the abuse of the writ doctrine is to spare the judicial system the burden of exploring the merits of such claims." *Id. See also Gullett v. Armontrout*, 894 F.2d 308, 310 (8th Cir. 1990). Thus, the focus necessarily must be on the Petitioner's conduct, not his subjective belief as to the merits of the claim.

Petitioner does not question the fact that there is no longer a requirement that the Petitioner himself actually participate in the decision not to raise the claim, a concept formally embodied in the *Fay* standard. The only question is whether the concept of abandonment necessarily includes a knowing and intelligent waiver and includes a requirement that the Petitioner or his counsel have knowledge of all of the facts pertaining to the claim before he can be said to have abandoned the claim and abused the writ. Respondent submits that there is no such requirement in the case law of this Court or in the rules dealing with abusive conduct, nor does Petitioner cite to any law requiring such a standard.

The concept of abuse of the writ is designed to prevent needless piecemeal litigation and particularly to prevent delay in death penalty cases. To allow a petitioner to excuse conduct such as that presented in the instant case by simply denying he was aware of all possible information at the time he made a specific decision that a claim was not meritorious and he would thus forego its presentation, undermines the entire purpose behind the abuse of the writ doctrine. Under this standard, Petitioner would not even have to prove unawareness but simply deny awareness.

Respondent submits that it would be appropriate for this Court to further define the concept of abuse of the

writ to require that when one is aware of a legal claim to the extent that it is actually raised in state court prior to the first petition in federal court, the failure to raise that claim in the first federal habeas corpus action constitutes an abuse of the writ. A petitioner's attempt to prove that he did not make a knowing and voluntary waiver of the claim under the *Johnson v. Zerbst* standard should be insufficient to excuse such abusive conduct.

II. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY FOUND THAT PETITIONER HAD ABUSED THE WRIT BY FAILING TO RAISE A *MASSIAH* CLAIM IN HIS FIRST FEDERAL HABEAS CORPUS PETITION.

Petitioner specifically challenges the decision of the Eleventh Circuit Court of Appeals finding an abuse of the writ in relation to Petitioner's allegation of a violation of *Massiah v. United States*, 377 U.S. 201 (1964). Respondent submits that the circuit court properly found that the district court abused its discretion in not finding an abuse of the writ and that Petitioner had failed to prove that he had not engaged in abusive conduct by omitting an exhausted claim from his first federal habeas petition which was ripe for adjudication.

It is clear that the basis utilized by the Eleventh Circuit Court of Appeals for finding an abuse of writ is one that has been long recognized and accepted by this Court. In *Sanders v. United States*, this Court acknowledged that an abuse of the writ could be found for several reasons, including *as examples* a deliberate withholding of grounds at the time of filing the first application or a deliberate abandonment of grounds at the first hearing.

This serves one purpose of the abuse of the writ doctrine, that is, to eliminate needless piecemeal litigation. This Court has also held, "Successive petitions for habeas corpus that raise claims deliberately withheld from prior petitions constitute an abuse of the writ." *Woodard v. Hutchins*, 464 U.S. 377 (1984); *see also Antone v. Dugger*, 465 U.S. 200, 206 (1984) ("as applicant had presented each of these claims to the state court before the first petition for habeas was filed . . . applicant hardly can contend that these claims were unknown to him at that time").

Petitioner seeks to avoid a discussion of his own conduct in this matter by focusing instead on the conduct of the state and the perceived errors in the opinion of the Eleventh Circuit Court of Appeals. Neither the conduct of the state nor any part of the opinion of the court of appeals excuses Petitioner's abusive conduct.

Contrary to Petitioner's assertions, to affirm the decision of the Eleventh Circuit Court of Appeals, it would not be necessary to "repudiate" years of jurisprudence of this Court. Rather, the Eleventh Circuit Court of Appeals properly applied the abuse of the writ standard and examined this case as an individual factual situation and found the conduct of counsel in this case to be abusive. Neither *Sanders*, 28 U.S.C. § 2244(b) nor Rule 9(b) purport to set forth an exclusive listing of abusive conduct.

One of Petitioner's complaints about the opinion of the Eleventh Circuit Court of Appeals revolves around what Petitioner deems to be that court's ignoring of factual findings made by the district court. A review shows that the circuit court accepted the factual findings made by the district court, but simply and correctly did not

accept the legal conclusions reached. This Court has long recognized that the clearly erroneous rule of Fed. R. Civ. P. 52(a) does not apply to conclusions of law. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). Further, if the findings of the court rest on an erroneous view of the law, those findings may be set aside. There is no rule or principle that will always specifically delineate what issues are questions of fact, what issues are questions of law and what issues are actually mixed questions of fact and law. "A finding of fact in some cases is inseparable from the principles through which it was deduced." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 n.17 (1984). *See also Fiske v. Kansas*, 274 U.S. 380, 385-7 (1927) (where "finding of fact and conclusion of law are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts.").

In a related context dealing with the presumption of correctness afforded to state court factual findings under 28 U.S.C. § 2254(d), this Court has also acknowledged this difficulty, but concluded that certain things such as the voluntariness of confessions, *Miller v. Fenton*, 474 U.S. 104 (1985), effectiveness of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984) and conflict of interest, *Cuyler v. Sullivan*, 446 U.S. 335 (1980), are mixed questions of fact and law and not pure questions of fact. Similarly, the district court's findings in relation to the abuse of the writ questions were mixed questions of fact and law. The Eleventh Circuit Court of Appeals accepted the factual findings of the district court, but disputed the ultimate legal conclusions reached by the district court, which legal conclusions are not entitled to be reviewed under the clearly erroneous rule.

The Eleventh Circuit Court of Appeals disagreed with the district court, first of all in the district court's ultimate conclusion that the Petitioner could not be said to have intentionally abandoned the *Massiah* claim. The circuit court specifically found that this disagreement was based on the appropriate legal standard to be applied and the meaning of intentional abandonment and not on the underlying factual findings of exactly what occurred. It is clear that the ultimate meaning of abuse of the writ and deliberate abandonment are legal questions and not factual matters. Once the definitions are established, then the conduct of an individual would necessarily be a factual finding.

Petitioner also takes issue with the circuit court's resolution of the allegation of inexcusable neglect and the inquiry into the investigation conducted by counsel. Again, the circuit court of appeals acknowledged the district court's factual findings in regard to what counsel did, but disagreed with the conclusion as to whether the investigation by counsel was legally sufficient and adequate to excuse Petitioner's abusive conduct. This issue, similar to an issue of effective assistance of counsel, is an ultimate legal issue, not a factual one. What actions counsel took is a factual question, but the adequacy and reasonableness of that conduct is not.

As concluded by the Eleventh Circuit Court of Appeals, a review of the testimony presented to the district court shows that there is no question but that the issue of a *Massiah* violation was abandoned. There is no question but that the issue was raised in the first state

habeas corpus petition and was asserted in an amendment to that first habeas corpus petition. It is uncontroverted that Petitioner did not raise the claim in the first federal habeas corpus proceeding.

Ironically, the district court itself reached two different conclusions on the question of abandonment. The district court originally began the hearing by noting that the testimony of Offie Evans was absolutely true and the court had no doubt as to the guilt of the Petitioner. (R4-4). The court emphasized that *Massiah* had been decided at the time of the first federal petition, it was eminently clear that Evans was a cellmate of the Petitioner and that those facts alone would always raise the possibility of a *Massiah* claim. The court also noted the testimony at trial that Evans had talked to a deputy. The court specifically asked why there had been no previous inquiry as to when, if at all, Mr. Evans became an agent of the state. *Id.* at 5.

The court at the beginning of the hearing concluded as well that the Petitioner was aware that there was a written statement. *Id.* at 9. The court subsequently emphasized its decision noting that the fact that the Petitioner was housed in a cell next to Evans and that Evans allegedly cooperated with law enforcement officers should put counsel on notice to inquire when the alleged cooperation began. Counsel for Petitioner, Mr. Stroup, himself acknowledged that it did occur to him that there might be a *Massiah* claim just on those facts and that was the basis for his raising the claim in state court. (R4-31). The district court initially held that it was clear that Mr. Stroup thought about the issue at the state habeas corpus proceeding and gave up the issue. (R4-59).

The district court noted that even including the written statement of Offie Evans, there was still no evidence of any prior arrangement and that there was no evidence that Evans was an agent or informant when he was initially placed in the jail cell and no indication of an *ab initio Massiah* violation. *Id.* at 61. The court ruled that as to the *ab initio* claim, the Petitioner was no further along at the beginning of the hearings in the district court than when Mr. Stroup made the decision that he did not have enough information to pursue the claim. (R4-70). From a review of these facts and other statements at the hearing, it is clear the district court itself initially found an abandonment of this claim of an *ab initio Massiah* violation, but went on to allow a hearing to develop the question of whether a Sixth Amendment violation occurred subsequently based upon the fact that the evidence showed the authorities talked with Mr. Evans on one date and did not obtain a written statement until several weeks later. The court's focus at the hearing was first on what information was obtained by Evans between those two dates. It was not until after two days of allowing the Petitioner to engage in discovery in front of the court, which could have been conducted during the first federal habeas corpus proceeding, and upon hearing the testimony of Mr. Worthy, that the court apparently simply changed its mind. Thus, in its final order, the district court completely reversed its position and concluded that Petitioner could not be said to have intentionally abandoned the claim although the court acknowledged that the Petitioner did drop the claim before the first federal petition because it was obvious the claim could not succeed. (J.A.

83). The district court then, unsupported by any evidence, changed its position on another point stating that the statement of Offie Evans was a strong indication of an *ab initio* relationship.

The discrepancies that Petitioner finds between the district and circuit courts lies in the legal conclusion as to what constitutes intentional abandonment and not in the factual determination as to what counsel did or what counsel knew. The Eleventh Circuit Court of Appeals credited the district court's finding that counsel was unaware of the statement, even though that finding is arguably clearly erroneous. The Eleventh Circuit Court of Appeals properly found, however, that Petitioner had abandoned this claim. Respondent submits that the court of appeals properly inquired as to the actual conduct of counsel, the specific intentional decision to delete the claim, and found that this constituted abusive conduct.

The further question presented was whether counsel was guilty of inexcusable neglect or other abusive conduct by not obtaining the evidence in support of the *Massiah* claim at some earlier date. Again, the district court entered a ruling at the beginning of the hearing and then subsequently reversed itself. The district court specifically found for purposes of those proceedings that the Petitioner was aware that there was a written statement of Offie Evans. (R4-9). The court emphasized the circumstances of the case in making this determination. The court also discussed the investigation by counsel, after reading the affidavits submitted. The court noted that Petitioner gave no indication he had talked to the officers involved, or subpoenaed the jail records and did not bring the claim in the first federal habeas corpus action.

(R4-67). The court emphasized that counsel had not "touched every base" until he had examined the police officers who investigated the case and allegedly had contact with Evans and until the records from the jail had been subpoenaed. (R4-71). The district court did not go so far as to find inexcusable neglect, but did express concerns about the adequacy of the investigation prior to the decision to omit the claim from the first federal habeas corpus action.

After conducting the hearings and allowing Petitioner to go into the merits of the issues, the court concluded that there was no inexcusable neglect. The court stated that the "state made no showing that Petitioner or counsel should have known to interview Worthy." (J.A. 85). This and other statements indicate that the court improperly placed the burden of proof on the state in making its legal conclusions on inexcusable neglect rather than requiring Petitioner to prove that he had not abused the writ. The court also incorrectly concluded that this was not the same claim raised in the first state petition.

Again, the Eleventh Circuit Court of Appeals did not dispute the district court's factual findings of what Mr. Stroup did, but rather concluded that what he did was not sufficient to justify or excuse the conduct in question. The circuit court concluded that the unsuccessful investigation would not insulate the abandonment of the claim after that investigation.

Mr. Robert Stroup testified before the district court that he made some minimal effort to seek information on a potential *Massiah* claim in 1980. (R4-31-3). He specifically recalled amending the state habeas corpus petition

which he viewed as raising a claim of a violation of *Massiah*. He knew by the time of the state habeas corpus proceeding that Evans had testified in another case involving the same assistant district attorney. Mr. Stroup acknowledged that he at no time talked to Detectives Harris or Dorsey prior to or subsequent to the state habeas corpus proceeding and did not recall talking to Deputy Hamilton even though Hamilton testified at the trial. Mr. Stroup did not even seek to question Detective Dorsey after Offie Evans mentioned Dorsey's name in his state habeas testimony and mentioned that Dorsey said he would speak a word for him. According to Stroup he simply spoke with a "couple" of police officers from the Atlanta Bureau of Police Services in an attempt to develop evidence in support of the claim. He did not attempt to subpoena any jail records or talk to the pertinent people. As noted by the Eleventh Circuit, "Counsel apparently made no attempt to contact persons who clearly had contact with Evans and McCleskey at the Fulton County Jail." (J.A. 126 n. 12). No one disputes these facts; the dispute arises over the ultimate legal conclusion of whether what Mr. Stroup did was adequate to excuse his abusive conduct.

From a review of the above it is clear that the Eleventh Circuit Court of Appeals properly found that counsel's investigation was not adequate to excuse the failure to have presented the claim or evidence earlier. Counsel should have discussed the matter with persons connected with the case and with Mr. Evans specifically.

Petitioner seems to assert that counsel had no obligation to talk with Detectives Dorsey or Harris or Mr. Hamilton because now, almost ten years after the state

habeas corpus proceeding in which this issue was raised, these individuals deny any knowledge of any move of Offie Evans or agency relationship between Evans and the State. What these witnesses testified to at this late date has absolutely no bearing on counsel's obligation at the time of his initial investigation. Counsel had the obligation at the time to inquire of the appropriate individuals. Whether he would have received information is not the question. The critical question for resolution is the adequacy of counsel's investigation.

Petitioner also attempts to focus the Court's attention on the conduct of the state in an effort to divert attention from his own abusive conduct. Clearly, Petitioner is the one seeking to invoke an equitable remedy and has to overcome the equitable bar. Contrary to Petitioner's assertions, the state has at no time concealed anything or engaged in any bad faith conduct. It should be noted that the state at all times has disputed the district court's finding of a *Massiah* violation and has continually asserted that the district court was clearly erroneous in these findings. Furthermore, the state presented the statement in question to the trial court for an in camera inspection as is proper. At the state habeas corpus proceeding, Petitioner did not request this statement but requested the file which was made available to trial counsel for discovery purposes, not the entire prosecution and police files. Mr. Parker even told Mr. Stroup of the existence of the statement in his deposition. At the hearing in the district court on the second federal petition, the assistant district attorney turned over his entire files, including all work product and even matters totally unrelated to the *Massiah* claim. When counsel filed the Open Record

Act request, apparently with the Atlanta Police Department, the statement in question was turned over to counsel. Thus, the conduct of the state cannot be used as an excuse by the Petitioner for his failure to conduct a further investigation.

Furthermore, the written statement of Evans did not support the Petitioner's *Massiah* claim. The district court itself initially noted that the statement did not present any further evidence to substantiate an *ab initio Massiah* violation, although the district court contradicted that finding in its later written order. The written statement of Offie Evans does no more than indicate that Mr. Evans talked with the police on two different occasions, that Mr. Evans initiated the conversations with the Petitioner and apparently misrepresented his identity to the Petitioner. This provides no more support to Petitioner's *Massiah* claim than was clearly available at the time of the first state habeas corpus proceeding.

Any alleged support for Petitioner's *Massiah* claim comes solely from the testimony of Mr. Ulysses Worthy. Mr. Worthy has never been hidden from the Petitioner. In fact, Petitioner discovered his existence by a simple question directed to Detective Harris at the hearings before the district court. Detective Harris volunteered the information that Mr. Evans was interviewed in Mr. Worthy's office. Had the Petitioner asked that question of Detective Harris ten years ago, he no doubt would have given the same answer.[2]

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[2] Petitioner would then have known to interview Mr. Worthy and a hearing could have been held at a time when the jail

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Petitioner asserts that he abandoned his claim only after the "officials" testified under oath. Petitioner asserts that Mr. Parker was the superior of the police officers, which is incorrect, and asserts that the state officials have lied. It should be noted that prior to the district court hearing on the second federal habeas corpus petition, the only individual whose testimony under oath was even remotely related to the *Massiah* claim was Mr. Parker. Mr. Parker has never testified that he knew of any agency relationship between Evans and the state, and the district court did not find that Mr. Parker knew of any such relationship. No other state "official" testified in relation to this claim prior to the second federal habeas corpus petition and no other state official, who was called to testify, provided Petitioner with any information prior to the hearings in the district court. Petitioner's assertions that officials "lied under oath" can only refer to the testimony presented during the hearings in the district court in which witnesses contradicted the testimony of Mr. Worthy. Again, this subsequent testimony has no impact on the adequacy of Petitioner's initial investigation. Petitioner does not know what the witnesses would have told him in 1980 or 1981 solely because he did not ask. Therefore, Petitioner's assertion that the state has engaged in a ten year pattern of suppression, denial and perjury is clearly an inaccurate representation of the record before this Court.

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records would still have been available and memories would have been fresh.

Therefore, it is clear that the Eleventh Circuit Court of Appeals was correct in its conclusion that Petitioner's initial investigation of the *Massiah* claim was inadequate to excuse his failure to have presented this evidence and raised the claim in the first federal habeas corpus proceeding. Thus, under either the standards of *Sanders v. United States* or under any modified standard this Court seeks to adopt, based on the inadequate investigation and the omission of the *Massiah* claim, the Eleventh Circuit correctly found that there was an abuse of the writ.

III. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY FOUND ANY ALLEGED *MASSIAH* VIOLATION TO BE HARMLESS.

Petitioner challenges the Eleventh Circuit Court of Appeals' finding of harmless error concerning the *Massiah* violation. Petitioner asserts certain "factual" findings by the district court in its harmless error analysis are entitled to be reviewed under the clearly erroneous rule, *citing Amadeo v. Zant*, 486 U.S. 214 (1988). Respondent submits the clearly erroneous rule does not apply to the harmless error question particularly when the district court ignored prior rulings by the *en banc* court and when any such "factual findings" were derived solely from the trial transcript and not from credibility determinations after an evidentiary hearing.

This Court has held that the clearly erroneous rule is not applicable where the dispute is "not so much over the elemental facts as over the constitutional significance to be attached to them." *Neil v. Biggers*, 409 U.S. 188, 193 n. 3 (1972). In this case, as in *Neil v. Biggers*, the Court is

examining "a habeas corpus case in which the facts are contained primarily in the state court record (equally available to us as to the federal courts below)" and where the hearings in the district court did not relate to the harmless error question. *Id. See also Napue v. Illinois*, 360 U.S. 264, 271-2 (1959) (Court examined facts on which constitutional claim rested, when question was whether false testimony in any reasonable likelihood affected the jury's verdict).

All so-called facts found by the district court in relation to the harmless error analysis are derived strictly from the trial transcript, not from any live testimony presented before the district court. In fact, the district court itself specifically ignored prior findings by the Eleventh Circuit Court of Appeals sitting *en banc*. Under these circumstances, there was no reason why the Eleventh Circuit Court of Appeals could not rely on its own prior opinion and rely on exactly what it observed from the trial transcript in making a harmless error analysis. The district court's statements that certain matters were testified to at trial did not amount to findings of fact, but were simply citations from the trial transcript. Any reviewing court can make similar citations to the existing record.

Specifically, Petitioner focuses on the purported finding by the district court that Offie Evans' testimony was "critical" to the state's case and the district court's purported findings that Ben Wright's testimony was "obviously impeachable." Petitioner ignores the fact that these were precisely the considerations of the Eleventh Circuit Court of Appeals sitting *en banc* upon review of the first federal habeas corpus action. It was this holding by the

Eleventh Circuit Court of Appeals that the district court in this case ignored in making its harmless error analysis. In fact, the Eleventh Circuit Court of Appeals did not state that it disagreed with the district court's finding as to Ben Wright's testimony, but did specifically disagree with the conclusion as to the nature of Offie Evans' testimony, relying on its prior holding. The clearly erroneous rule of Fed.R.Civ.P. 52(a) is inapplicable particularly when a question of whether the testimony of a given witness was "critical" is not a pure factual finding.

This Court has acknowledged that Sixth Amendment violations under certain circumstances may be subject to a harmless error analysis. *See United States v. Morrison*, 449 U.S. 361 (1981). The Eleventh Circuit Court of Appeals made a correct analysis of the harmless error question utilizing the standard of *Chapman v. California*, 386 U.S. 18 (1967).

Petitioner and the district court concluded that Evans' testimony was critical to establish that the Petitioner was the triggerman and to establish malice. This is based on testimony by Evans that the Petitioner admitted shooting the policeman, stated he wore makeup during the robbery and stated he would have shot his way out even if there had been a dozen policemen.

The Eleventh Circuit examined first the testimony of Offie Evans regarding Petitioner's admission that he was the triggerman. The Court noted that the state presented a substantial amount of circumstantial evidence relating to this aspect of the case, including Petitioner's own confession that he participated in the robbery. The evidence also showed that the officer was killed by the man

who entered the front of the store and the Petitioner was identified by two employees as the robber who came in the front door. The officer was killed by a .38 caliber Rossi and the state showed Petitioner had stolen a .38 caliber Rossi in an earlier robbery. Finally, evidence showed Petitioner carried a weapon with a white handle and an eyewitness saw a man run out the front door carrying a pearl-handled pistol. *McCleskey*, 890 F.2d at 352. The Court also noted that Ben Wright, the coindictee, also testified that McCleskey was the triggerman. The Court held that the other evidence at trial was such that the Court could conclude that any additional testimony by Offie Evans did not contribute to the verdict.

The Court also examined Mr. Evans' testimony relating to the assertion that the Petitioner was wearing makeup. This was examined by the panel as well as by the *en banc* court and was found not to be crucial to the state's case. This evidence supported the assertion that the Petitioner was the robber entering the front of the store. There was already testimony directly to this effect by Ben Wright as well as by two eyewitnesses to the crime and was corroborated by the Petitioner's own confession. Thus, this one aspect of the testimony also could reasonably have been said not to contribute to the verdict.

Finally, the other assertion relates to the testimony by Offie Evans that the Petitioner would have been willing to shoot his way out if there had been twelve policemen. Again, this particular piece of testimony, if erroneously admitted, was harmless beyond a reasonable doubt. As noted by the Eleventh Circuit Court of Appeals, this was not focused upon in the prosecutor's closing argument as

the prosecutor argued malicious intent based upon the physical evidence that the Petitioner shot the police officer once in the head and a second time in the chest as he was dying on the floor of the store, that the Petitioner could have surrendered but chose instead to kill the police officer, thus indicating malice, as well as arguing the one statement from Mr. Evans. Thus, the evidence pertaining to malice was overwhelming and the testimony of Offie Evans did not contribute to the verdict on malice murder. Furthermore, Mr. Evans did not testify at the sentencing phase of the trial and the testimony of Evans was not used by the prosecutor during his argument at sentencing to portray Petitioner as a malicious criminal, but rather, the prosecutor focused on the prior convictions of Petitioner.

As can be seen, this case is readily distinguishable from *Satterwhite v. Texas*, 486 U.S. 249 (1988), in which the critical testimony was from a psychiatrist. There this Court noted that the testimony was important because of the qualifications of the psychiatrist and because of the "powerful content of his message." *Id.* Contrary to *Satterwhite*, the testimony in this case did no more than corroborate other evidence already in the record and, thus, was harmless beyond a reasonable doubt.

Respondent therefore submits that even if there is no abuse of the writ found, any alleged *Massiah* violation was harmless beyond a reasonable doubt.

IV. THE DISTRICT COURT ERRED IN FINDING A VIOLATION OF *MASSIAH V. UNITED STATES* AND THE FINDING BY THE DISTRICT COURT TO THIS EFFECT IS CLEARLY ERRONEOUS IN LIGHT OF THE OVERWHELMING EVIDENCE TO THE CONTRARY.

Respondent has at all times contested the district court's conclusion that there was a violation of *Massiah v. United States*. Should this Court resolve the abuse of the writ issue adversely to Respondent, the issue of the clearly erroneous factual findings by the district court must then be resolved, or the case remanded to the circuit court for a determination of that issue.

Respondent asserted in the court below that certain findings by the district court are clearly erroneous under Rule 52(a) of the Federal Rules of Civil Procedure. Clearly, this Court may reverse any such factual findings where they are deemed to be clearly erroneous. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Respondent would further submit that the district court's view of the evidence is "not plausible in light of the record viewed in its entirely." *Amadeo v. Zant*, 486 U.S. 214, quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-4 (1985).

The district court essentially resolved the agency question based upon the testimony of one witness, Ulysses Worthy. The Court believed only a small portion of Mr. Worthy's testimony, concluded that the rest of his testimony was obviously incorrect and disregarded the

testimony of the remaining witnesses before the district court. The court then created a scenario that the court believed plausible, but which is without evidence to support it. Respondent submits that based upon the entire evidence, the factual findings by the district court were clearly erroneous.[3]

Respondent submits that a review of the facts set forth *supra* and all of the evidence shows that the factual finding by the district court, in which the court finds that a request was made to move Offie Evans, is clearly erroneous. The further conclusion by the district court based upon this one factual finding that Evans was an agent has absolutely no support in the record. Mr. Worthy's testimony was "so internally inconsistent on its face or implausible that a reasonable factfinder would not credit it." *Anderson* at 575. Respondent submits that a review of all of the testimony and evidence shows that the district court was clearly erroneous in its factual finding regarding Mr. Evans and was also legally incorrect with regard to its final conclusion of a *Massiah* violation. Therefore, if this Court does not find an abuse of the writ, the finding by the district court to the contrary should be reversed or the case remanded to the Eleventh Circuit Court of Appeals for resolution of this issue.

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[3] It is pertinent to note that the coindictee's habeas corpus action was heard by a different district court judge who heard the same witnesses testify and who also considered the deposition testimony of Evans that Judge Forrester refused to consider. That court reached the exact opposite factual conclusion. See *Depree v. Newsome*, No. 1:85-CV-3733-RLV (N.D. Ga. July 10, 1990). (Appendix to Respondent's brief).

V. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING RESPONDENT'S MOTION FOR RELIEF FROM JUDGMENT.

Respondent also submits that if this Court concludes that the district court did not err in failing to find an abuse of the writ and was not clearly erroneous as to its factual findings as set forth above, then Respondent submits that the case should be remanded for a resolution of the challenge to the district court's denial of Respondent's motion for relief from judgment.

The Respondent's motion was filed to seek to include the testimony of Offie Evans, who did not testify originally before the district court. Upon discovering the availability of Mr. Evans, Respondent filed an appropriate motion seeking relief from judgment under Fed.R.Civ.P. 60(b)(2) and (6).

The deposition of Offie Evans was taken and other documents were submitted to the district court. The district court denied the motion for relief from judgment finding that insufficient cause had been shown under Rule 60(b) to justify the granting of such relief. Respondent submits that this was an abuse of discretion by the district court.

In filing the motion with the district court, the Respondent recognized that the testimony of Mr. Evans did not fit within the traditional definition of newly discovered evidence as Mr. Evans was previously known to be a critical witness and there was some indication from the record that Evans would testify contrary to what had been presented at the district court hearing. Mr. Evans was not available to testify before the district court

and, under those circumstances, it should be deemed to be newly discovered under Rule 60(b)(2), or should have justified relief from judgment under Rule 60(b)(6) permitting judgment to be set aside for "any other reason justifying relief from the operation of a judgment."

Contrary to the assertions of the district court, if the evidence of the testimony of Evans was properly considered and proper credibility findings were made, the evidence is such that a new trial would probably produce a new result. The district court chose to ignore its own earlier statements that Evans' written statement to the authorities was credible and that Mr. Evans would be a credible witness and concluded that Mr. Evans would have some reason for lying due to the fact that he would not want to be known as an informant. This conclusion is unwarranted as the mere fact that Mr. Evans testified in the trial of the Petitioner's case establishes any danger with which Mr. Evans would be concerned. With Mr. Evans testifying directly contradictory to the only witness truly credited by the district court and when that one witness gave such an implausible version of events, and when Mr. Evans' testimony corroborates the testimony of other witnesses and provides a logical chain of events that occurred, then it seems quite likely if Mr. Evans' testimony were appropriately considered, a different result *should* be produced.[4]

Even if the district court did not abuse its discretion in concluding that the requirements of Rule 60(b)(2) had

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[4] As noted previously, that is precisely what happened when a different district court judge considered the coindictee's case, including the deposition of Offie Evans.

not been met, Respondent submits that this case then falls squarely within the parameters of Rule 60(b)(6), providing for the granting of such relief for "any other reason justifying relief from the operation of the judgment." Under the unusual circumstances of the instant case, the availability of Mr. Evans would justify the granting of relief from judgment.

This Court has recently considered Rule 60(b)(6), noting, "The rule does not particularize the factors that justify relief, but we have previously noted that it provides courts with authority 'adequate to enable them to vacate judgments whenever such actions are appropriate to accomplish justice,' (cite omitted), while also cautioning that it should only be applied in 'extraordinary circumstances.' (Cite omitted)." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, (1988). *See also Klapprott v. United States*, 335 U.S. 601, 615 (1949). Respondent submits that under the circumstances of this case, the granting of relief under Rule 60(b) is appropriate. The district court seemed to conclude that the granting of such relief was not appropriate as there was no conclusion that the denial of the motion would result in an extreme hardship to the Respondent. This completely ignores the fact that the district court had granted habeas corpus relief in this action resulting in the necessity of a new trial by the state years after the original trial was completed, requiring extensive efforts to relocate evidence, witnesses, and prepare a case for trial when, with the granting of the motion, such extreme hardship might not result.

Under the circumstances of this case, Respondent submits that justice virtually dictated the granting of the

motion for relief from judgment and, therefore, the district court's failure to do so was clearly an abuse of discretion.

CONCLUSION

For all of the above and foregoing reasons, Respondent prays that the judgment and verdict of the Eleventh Circuit Court of Appeals be affirmed, or that the case be remanded to that court for a consideration of the two issues left undecided.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BERNARD DEPREE,	:	
Petitioner,	:	CIVIL ACTION
vs.	:	
LANSON NEWSOME,	:	No. 1:85-cv-3733 -RLV
Respondent.	:	

ORDER

Bernard Depree was indicted in the Superior Court of Fulton County, Georgia, on June 13, 1978, along with David Burney, Jr., Warren McCleskey, and Ben Wright for two counts of armed robbery and the murder of police officer Frank Schlatt. Warren McCleskey was tried separately from the other co-defendants and received a death sentence. DePree was tried jointly with Burney and was found guilty of murder and two counts of armed robbery. On November 20, 1978, Depree was sentenced to life imprisonment on each count to be served consecutively.

DePree's convictions and sentences were affirmed by the Supreme Court of Georgia, Depree v. State, 246 Ga. 240 (1980). His petition for a writ of habeas corpus was denied by the Superior Court of Tattnall County, Georgia, and on May 1, 1985, the Supreme Court of Georgia denied Depree's application for a certificate of probable cause.

DePree filed a petition for a writ of habeas corpus in this court, which was denied; DePree then filed a notice of appeal to the Eleventh Circuit. Subsequently, because of developments in Warren McCleskey's habeas corpus

proceedings, DePree filed a motion with the Court of Appeals asking for a conditional dismissal of the appeal and a mandate to the district court to reopen the proceedings to allow the taking of additional evidence. On August 10, 1987, the Eleventh Circuit entered an order remaining [sic] the case to it so that this court could pass on DePree's *Massiah* claim. Massiah v. United States, 377 U.S. 201 (1964). The Court of Appeals subsequently expanded the scope of its remand order by allowing the petitioner to present a *Giglio* claim also. Giglio v. United States, 405 U.S. 150 (1971).

This court initially delayed in acting on the Eleventh Circuit's remand order, awaiting the outcome McCleskey's habeas proceeding. However, because Judge Forrester had made certain credibility choices with respect to the testimony offered in McCleskey's habeas corpus proceedings, this court determined that it was necessary for it also to conduct an evidentiary hearing in which it could weigh the credibility of the witnesses and make its own determinations with respect to such credibility. Therefore, this court heard evidence on September 5 and 6, 1989, and allowed DePree and the State to submit post hearing briefs. The matter is now ripe for a determination of the issues which this court has before it as a result of the remand from the Eleventh Circuit.

In Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199 (1964), the Supreme Court held that the Sixth Amendment right-to-counsel provision precluded the use of a defendant's incriminating statements obtained through a police informant after the defendant had obtained counsel. In arguing that *Massiah* requires that his conviction and sentence be set aside, DePree contends

that Offie Gene Evans and Howard Smith were acting as police informants when they overheard or elicited incriminating statements from him.

Offie Evans was arrested on July 3, 1978, and taken to the Fulton County Jail. On July 12, 1978, Evans met with Russell Parker, the assistant district attorney prosecuting the Frank Schlatt murder case, and two detectives from the Atlanta Police Department at the Fulton County Jail. At this time Evans recounted various incriminating statements made by both McCleskey and DePree with respect to the murder of Officer Schlatt. Evans later signed a written statement on August 1, 1978. Mr. Parker testified that Evans did not tell him anything different on August 1 than he had on July 12.

Mr. Parker, Detective Welcome Harris, Officer Sidney Dorsey, and Deputy Sheriff Carter Hamilton all denied that they ever requested that Evans be placed in a cell next to Warren McCleskey or that he attempt to obtain any incriminating statements from McCleskey or DePree. Evans himself testified upon being arrested and taken to the Fulton County Jail he was immediately placed in Cell 1 North 14 (*i.e.*, Cell No. 14 on the first floor of the North wing); McCleskey was in the adjoining cell, 1 North 15, and Depree was in the cell immediately over DePree, 2 North 14. Evans further testified that he was never moved from his original cell during the time he was incarcerated at the Fulton County Jail.

Evans testified that a deputy sheriff, whose name he could not recall, had apparently overheard conversations going on in the cell block and suggested to Evans that he might have obtained information that the police would be

interested in; Evans testified that when the deputy sheriff asked if he would be willing to talk to the police about those conversations, Evans agreed to do so. Carter Hamilton testified, however, that Evans approached him, stating that he had information regarding Officer Schaltt's murder although Evans gave no specifics at that time; Hamilton informed Evans that he would put him in touch with the police and that within a day or two of the conversation Deputy Hamilton arranged for Mr. Parker and two detectives to come to the jail.

The only testimony supporting DePree's allegation of a *Massiah* violation comes from Ulysses Worthy, who was captain of the day watch in charge of the jail in 1978. Captain Worthy testified twice during the McCleskey hearings, on July 9, 1987, and again on August 10, 1987. On July 9, Captain Worthy testified that he recalled a meeting between Evans, Detective Dorsey, and, possibly, another person. Captain Worthy testified that, although he was not a participant in this meeting, he was present part of the time. When asked if he recalled whether Detective Dorsey asked Evans to listen to what he heard at the jail from those who may have been near him, Captain Worthy replied, "No, sir, I don't recall that." In response to further questions, however, Captain Worthy seemed to equivocate.

Q Do you recall whether he asked him to engage in conversations with somebody who might have been in a nearby cell?

A Seems I recall something being said to that effect to Mr. Evans.

Q Okay.

A But I'm not sure that it came from Mr. – from Detective Dorsey or who.

Q In other words, somebody present in that conversation said that but you're not certain whether it was Mr. Dorsey or perhaps his partner or somebody else there?

A I'm really not sure.

Q Okay. Did Mr. Evans, to your recollection, agree that he would do that?

A I'm not sure.

(Tr. 148-49).

On July 9, Captain Worthy also testified he had been requested to move Evans to a cell near McCleskey:

Q Mr. Worthy, let me see if I understand this. Are you saying that someone asked you to specifically place Offie Evans in a specific location in the Fulton County Jail so he could overhear conversations with Warren McCleskey?

A Yes, ma'am.

Q When was that request made and by whom?

A I don't know exactly who made the – who asked for the request but during this particular time there was several interviews of Mr. Evans by various officers.

Q All right. And –

A And the exact one that asked that request be made, I really can't say now. I really don't know.

Q All right. Now, so you're saying they did – they wanted Mr. Evans to go in and serve as a listening post? Is that what they asked you to do?

A Well, they asked that he be placed near Mr. McCleskey.

Q Was that when Mr. Evans first came into the jail?

A I'm not sure whether that was when he first came in or not. I'm not sure.

(Tr. 153-55).

On August 10, 1987, during the McCleskey habeas proceeding Captain Worthy testified that the first instance in 1978 in which Evans was brought to his attention was when Carter Hamilton brought him down to his office and stated that Evans wanted to call either the district attorney's office or the police department because he had some information he wanted to pass on to them. (Tr. 14). Captain Worthy then testified as follows:

Q To your knowledge, when was the first time that Evans was interviewed at the Fulton County Jail by the investigators on the Schlatt murder?

A The exact time or date I don't recall that.

Q All right. Why don't we do this: In relation to the meeting that you had in your office with Carter Hamilton and Offie Evans when Hamilton asked you for permission to call the investigators, approximately how long thereafter did the investigators come out to the jail and talk to Offie Evans?

A To my knowledge, it was a matter of a few days.

Q All right. Now, to your knowledge, when they came out in a matter of a few days, to your knowledge, was this the first time that the investigators ever came out to talk to Offie Evans about the Schlatt murder?

A To my knowledge, yes.

Q All right. Now, where did this meeting take place?

A In my office.

. . . .

Q All right. Did you go over and join them?

A Join them?

Q Yeah, did you join them?

A Not really, no.

Q Okay. Did any of them ever make – did any of them make a request of you at that time? Did they ask you to do anything, the officers?

A Not that I can recall.

Q All right. Were you ever asked to move Offie Evans from one cell to another?

A Yes, sir, I was.

Q Who asked you to make this move?

A I'm not sure, but it would have to be – to have been one of the officers, either Carter Hamilton or it might have been Offie Evans. I'm really not sure at this point.

. . . .

A It was, oh yeah, I believe it was Carter Hamilton. I believe it was Carter Hamilton that asked.

Q All right. So Carter Hamilton asked you to move Offie Evans?

A Right.

Q Now, what did you do in response to Carter Hamilton's request to move Offie Evans?

A Well, after he explained why he wanted him moved, I gave him permission to do so.

Q Okay. Now, when did he ask you to move Offie Evans in relation to the interview with the investigators?

A The same day of the interview.

. . . .

Q Now, this request by Carter Hamilton, was this the only time you were asked to move Offie Evans?

A Yes, sir.

(Tr. 16-19).

On September 5, 1989, at the evidentiary hearing conducted in the instant case Captain Worthy testified as follows:

Q Had it ever come to your attention [that Evans] knew anything in particular about the Schlatt murder case and the furniture store robbery before Mr. Hamilton brought it to your attention?

A No, I never discussed anything like that with him.

Q The first time you knew of that would be on July 11, 1978?

A If that is when Mr. Hamilton brought it to my attention.

Q And in the meeting, then there was a meeting at the prison; is that correct, shortly thereafter in which Mr. Parker and other people came and talked to Mr. Evans?

A There was a meeting at the jail.

Q Do you recall how long after Mr. Hamilton talked to you that that occurred?

A I really don't know. I don't know exactly how long it was afterwards.

Q If there was some indication someone came to the jail on July 12, 1978, would you disagree with that date?

A No, I couldn't disagree.

Q Now, is it correct that no one asked you to move Mr. Evans until after that meeting took place at the jail?

A It was after the meeting that they asked.

Q To clarify for the moment, the meeting I am talking about is when Mr. Parker came out to the jail and two other detectives came out after Mr. Hamilton had talked to you, that's the meeting I'm talking about. Ha[d] anybody asked you to move Mr. Evans before that meeting took place?

A No, not to my knowledge.

Q Now, except for that particular meeting, were you ever present in the room when anyone talked to Mr. Evans about the murder of Frank Schlatt in that furniture store robbery?

A No.

Q Mr. Worthy, you did not ever actually see Offie Evans moved from one cell to another?

A No, I did not see him moved from one cell to another.

. . . .

Q Now Mr. Worthy, to your knowledge, isn't it true that Mr. Evans was not moved from the time he was brought in the Fulton County Jail in the early part of July until the day he had that meeting with Mr. Parker and the detectives?

A To my knowledge, Offie Evans was moved after the meeting.

Q You don't know for a fact that he was moved? You said you didn't see him moved; is that correct?

A I did not see him moved but the request came to me from one of the officers at the jail asking that he be moved.

Q When did that take place?

A After the meeting with the detectives.

. . . .

Q Now, did you ever hear anyone tell Mr. Evans to listen to conversations of Bernard DePree or Warren McCleskey?

A No, I didn't.

(Tr. 1-57 through 1-60).

This court finds Captain Worthy's testimony to be inherently contradictory and not credible. It is uncontradicted that Evans was already in the cell next to Warrer McCleskey prior to the July 12 meeting with Mr. Parker and two detectives; otherwise, it would have been impossible for Evans to have relayed the content of any conversations he had had with McCleskey to Mr. Parker at that meeting. Nevertheless, Captain Worthy has testified on numerous occasions that the purported request to move Evans did not take place until after that meeting.

This court does not impute any sinister motive to Captain Worthy; the court simply notes that the events to which Captain Worthy testified occurred approximately ten years ago and that Captain Worthy had no notes or other documents to refresh his recollection of the events which occurred in July 1978. The court does note that there was testimony that prisoners who were considered an escape risk were housed in the north wing of the Fulton County Jail. Since Offie Evans was arrested as an escapee from a federal halfway house, it would have been standard procedure for him to have been housed in a single cell in the north wing of the jail. Captain Worthy's memory of a request to move Evans may simply have been the result of Evans' being described as an escape risk and a request that he be housed in the north wing. This court chooses to believe the testimony of Evans, Mr. Parker, and all other persons (except Captain Worthy) who unequivocally testified that Evans was originally placed in Cell 1 North 14, was never moved to another cell which he was incarcerated at the Fulton County Jail, overheard conversations between McCleskey and DePree and reported the substance of those conversations to the police and the district attorney's office, and was not acting at the behest of the police which he engaged McCleskey and DePree in conversation and reported the substance of such conversations to the police.

DePree also relies upon the testimony of Howard Smith to support his claim of a *Massiah* violation. Smith is a seasoned felon who in August 1978 was incarcerated in the Fulton County Jail, charged with escape and auto theft. While in the Fulton County Jail, Smith was housed in a cell with DePree and one other inmate.

Smith had his sister contact the Atlanta Police to tell them that he had information regarding Officer Schlatt's murder. His sister apparently called the police because a detective came to the jail and interviewed Smith. Smith was interviewed on at least two other occasions and gave written statements. The only part of Smith's testimony even hinting at a *Massiah* violation is as follows:

> Q What were you trying to – why were you asking those questions [to DePree]?
>
> A Well, the reason I was asking him the questions, because I was told to find out more information from him about what happened.
>
> Q And who told you to find out more information about what happened?
>
> A Mr. Harris.

(Tr. 1-17).

This court does not view this statement by Detective Harris, even if accurately recalled by Smith, as sufficient to convert Smith's status to that of "police informant" so as to invoke *Massiah*. Since Smith had initiated the contact with the police and had already relayed the substance of the information he had gathered from DePree, it is obvious that the statement by Detective Harris is little more than to the effect, "If you learn any more information, please let us know." This court holds that such encouragement given to an inmate is insufficient to invoke *Massiah*.

For the foregoing reasons, this court holds that DePree's Sixth Amendment right to counsel, as enunciated in *Massiah*, was not violated when Evans and Smith testified against him at his trial.

In Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763 (1972), the Supreme Court held that evidence which reflects on the credibility of witnesses must be disclosed to a defendant. In the instant case, DePree argues that promises were made both to Offie Evans and Howard Smith and that these promises were not disclosed to defense counsel.

Although Evans undoubtedly hoped to gain something by revealing to the police the statements he had overheard by McCleskey and DePree (this court doubts that many felons "snitch" on other felons merely out of any sense of civic obligation), there is no credible evidence in the record to suggest that any promises were made to Evans to elicit his testimony. Indeed, even if one of the police officers or the assistant district attorney had promised to "speak a word" in Evans' behalf in his own case, this court holds that in the instant case such a statement did not have to be disclosed pursuant to *Giglio*. Indeed, in McCleskey's case, the Court of Appeals assumed that such a statement had been made and stated, "The detective's statement offers such a marginal benefit, as indicated by Evans, that it is doubtful it would motivate a reluctant witness, or that disclosure of the statement would have had any effect on his credibility. The State's non-disclosure therefore failed to infringe McCleskey's due process rights." McCleskey v. Kemp, 753 F.2d 877, 884 (11th Cir. 1985) (*en banc*). This court holds that DePree has failed to present sufficient evidence to show a *Giglio* violation with respect to Evans.

Howard Smith testified before this court that Detective Harris and Russell Parker both told him not to worry and that they would take care of him. He stated that no

other promises were made other than that he would be taken care of. Both Detective Harris and Mr. Parker testified that they could not recollect having made any promises whatsoever to Smith.

Again, this court does not believe that Smith testified against DePree out of a sense of civic obligation. As a seasoned felon, Smith undoubtedly hoped that his cooperation would result in more favorable treatment. However, this court holds that the marginal statements purportedly made by Detective Harris and Mr. Parker were not of such a nature that, under the circumstances of this case, they had to be disclosed to defense counsel at DePree's trial. (Indeed, Mr. Parker testified that there could have been no deals made with Smith regarding his testimony in DePree's case because the term of court at which Smith had been sentenced had already passed at the time he testified at DePree's trial, and under state law, a sentence cannot be changed once the term of court has passed.)

For the foregoing reasons, this court holds that no promises were made to Smith that were required to be disclosed to DePree under *Giglio*.

DePree also asserts that his Fifth and Fourteenth Amendment rights were violated when the state failed to correct perjured testimony at the trial. This allegation is based upon Evans' testimony at DePree's trial that DePree "hoped that Ben [Wright] was going to get caught before they go to court, because he might would tell them how that thing went down, and he said that he hoped that nine out of ten in the case of Ben they were going to kill him anyway." (Trial transcript 966-67). DePree argues

Evans had previously claimed that this statement was made by McCleskey not DePree. However, Evans' trial testimony is consistent with the statement he signed on August 1, 1978, in which he said:

> DuPreee [*sic*] and McClesky [*sic*] started talking again saying "[*sic*] that they hoped that enough heat was on Ben, so that they would [*sic*] Ben when they ran down on it, and if they dokill [*sic*] him, it would be better in their favor because he know that Ben was mad about them pointing the killing at him, because they know that Ben would go and tell the truth to keep from getting tied up in that murder. DePree [*sic*] told McClesky [*sic*] 9 times out of 10 they are going to kill him any way because Ben wasn't as smart as he thought he was. . . .

The only thing in the record even remotely hinting that DePree has changed his testimony is a copy of Mr. Parker's notes which he prepared as an aid in his closing argument. On those notes his comment that DePree had told McCleskey that nine times out of ten they were going to kill Ben anyway has been stricken through and a notation has been made by the assistant district attorney assisting Mr. Parker to the effect that Evans now says McCleskey made the statement. This handwritten notation shows nothing more than that Mr. Parker's assistant recalled Evans' trial testimony differently than what actually occurred. Other than this notation, there is no evidence in the record that Evans ever testified that the statement was made by McCleskey rather than DePree. The court finds this argument to be totally without merit.

For the foregoing reasons, this court finds that DePree has stated no grounds which would entitle him to

a writ of habeas corpus. The clerk is directed to transmit to the Court of Appeals a copy of this order together with the record that has been compiled since the order of remand from the Eleventh Circuit.

SO ORDERED, this 10th day of July, 1990.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
United States District Judge